

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 521 of 2005

Sau.Khudijabai Yasin Palkar ... Petitioner

V/s

Liyakat Yasin Palkar and Anr... Respondents

Shri P.J.Pawar for Petitioner

Shri A.S.Gadkari,A.P.P. for State

Shri L.S.Gaikwad for Respondent no.1.

CORAM:A.S.OKA, J.

DATED:19th August 2005.

P.C.:-

1. On 10th August 2005 the Advocate for the Petitioner stated that there was no possibility of settlement and therefore, the matter was adjourned to 16th August 2005. It was made clear that the petition will be heard finally on next date.

2. The challenge in this petition under Article 227 of Constitution of India is to the order dated 23rd November 2004 passed by the learned Additional Sessions Judge, Karad, District Satara.

3. An application was filed by the Applicant for grant of maintenance allowance under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973). By order dated 27th June 2001, the learned Judicial Magistrate, First Class, Karad directed the Respondent no.1 to pay monthly maintenance at the rate of Rs.600/- to the Petitioner. As Respondent no.1 did not comply with the said order granting maintenance, an application was made by the Petitioner under Section 125(3) of the said Code of 1973 for recovery of maintenance. By order dated 20th December 2003, the said application was dismissed for want of prosecution as withdrawn. The Petitioner filed a fresh application for recovery being Application No.171 of 2004. The said application for recovery was opposed by Respondent no.1. The main ground on which the said application was opposed was that in previous application filed for recovery by the Petitioner, a statement was made by the Petitioner that from time to time Respondent no.1 has paid maintenance amount of Rs.600/- to the Petitioner. The said statement was made in application dated 20th December 2003 filed by the Petitioner. In addition to the said statement, she also stated in the said Application that she was residing with Respondent no.1 who is her son and Respondent no.1 has been maintaining her. On the basis of the said application made on 20th December 2003, the Petitioner was allowed to withdraw the earlier recovery

application. a submission is made by Respondent no.1 while opposing the second recovery application made by the Petitioner that in view of the said application made by Petitioner on 20th December 2003, the Petitioner cannot claim any maintenance from the Respondent no.1 on the basis of order dated 27th June 2001. By order dated 26th July 2004 the learned Judicial Magistrate, First Class held that the Petitioner is entitled to enforce the order granting maintenance and therefore Respondent no.1 should take a note and make the payment.

4. Being aggrieved by the said order, the Respondent no.1 preferred a revision application before the Sessions Court. The Sessions Court allowed the said revision application by holding that recovery application was not maintainable as in view of earlier compromise, the Petitioner will have to file a fresh petition for maintenance under Section 125 of the said Code on a fresh cause of action.

5. The learned Advocate appearing for the Petitioner submitted that original order passed under Section 125 of said Code is still operative and unless that order is set aside or varied, the Petitioner has right to seek enforcement thereof. The learned Counsel for the Respondent no.1 submitted that the application dated 20th December 2003 filed by the Petitioner clearly discloses that liability of Respondent no.1 to pay maintenance did not survive. He submitted that no

interference is called for as an equitable order has been passed by the learned Additional Sessions Judge, Karad.

6. I have considered rival submissions. It is not in dispute that the order passed under Section 125 of said Code has attained finality in the sense that the said order is neither set aside nor varied in accordance with law. Perusal of application dated 20th December 2003 submitted by the Petitioner discloses that till that date, the maintenance amount at the rate of Rs.600/- per month has been paid by Respondent no.1 to the Petitioner. The application shows that the Petitioner is residing with Respondent no.1 and Respondent no.1 is looking after the Petitioner. The learned trial Judge passed an order on the said application to the effect "On oral enquiry the applicant has requested to dispose of the petition. Hence allowed to withdraw the petition". On the basis of the said application, the earlier recovery application was allowed to be withdrawn. There is no order passed by the learned trial Judge varying the original order under Section 125. Thus the disposal of the earlier recovery application cannot come in the way of the Petitioner applying for recovery for the subsequent period. The application dated 20th December 2003 records that till that date maintenance amount has been paid to the Petitioner. Therefore, the Petitioner cannot obviously seek recovery of maintenance for the period prior to

21st December 2003.

7. The learned Additional Sessions Judge has committed clear error by holding that the Petitioner will have to file a fresh application for maintenance under Section 125. As the earlier order under Section 125 was very much in force, the Petitioner was not required to file a fresh application. It is pertinent to note that in the recovery application No.171 of 2004 the Petitioner has prayed for recovery of maintenance amount from May 2003 to May 2004. In view of withdrawal of earlier application on the basis of application dated 20th December 2003, the Petitioner cannot claim maintenance amount for a period prior to 21st December 2003. Thus for a period from 21st December 2003 onwards the recovery application filed by the Petitioner was maintainable.

8. Respondent no.1 has pleaded existence of change of circumstances. It is for Respondent no.1 to apply under Section 127 of the said Code, if there is a real change in circumstances warranting variation of the earlier order. So long as the order under Section 125 stands, the Respondent no.1 will have to comply with the said order.

9. Hence I pass the following order :

i. The impugned judgment and order dated 23rd November

2004 is quashed and set aside. Recovery application filed by the Petitioner being Application No.171 of 2004 is restored and the same will be decided by the trial Court in accordance with law in the light of the observations made in this judgment.

ii. This order will not prevent Respondent no.1 from making an application under Section 127 of the Code of Criminal Procedure, 1973.

iii. Petition is disposed of in above terms with no order as to costs.

(A.S.OKA, J.)